JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

Mr Losali v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO D-05–199 OF 2009
HASAN LAH, ABDUL MALIK ISHAK AND AZHAR MA'AH JJCA
4 MAY 2011

Criminal Law — Dangerous Drugs Act 1952 — s 12(2), s 39B — Trafficking in dangerous drugs — 14,964.5g of cannabis — Appeal against conviction — Whether common intention established — Whether appellant principal organiser in supplying drugs in question — Whether 'supplying' dangerous drugs amounts to 'trafficking' under s 2 of the Dangerous Drugs Act 1952 — Whether evidence of agent provocateur testifying for prosecution ought to be corroborated — Defence of bare denial — Whether prosecution case proven beyond reasonable doubt

Criminal Procedure — Prosecution — Prima facie case — Duty of court at end of prosecution's case — Maximum evaluation of prosecution's evidence — Scope and extent of 'maximum evaluation' — Whether thorough examination of evidence to be undertaken

Evidence — Agent provocateur — Admissibility of evidence — Whether evidence of agent provocateur in drug trafficking case required corroboration — Whether evidence admissible — Dangerous Drugs Act 1952 s 40A(1)

Detective Sergeant Busra ('SP5') and Chief Inspector Ahmad ('SP6') were directed to act as agents provocateur. They were introduced by a source to the appellant. The appellant was willing to supply about 30kg of *ganja*. Several weeks later SP5 received a telephone call from the appellant informing SP5 that he had about 40kg of *ganja* with him. The appellant later introduced SP5 and SP6 to the second accused and they discussed about the supply of the drugs. On the day of the arrest, SP5 and SP6 met the four accused at a stall where they discussed the price of the drugs. The third accused then brought SP5 to a Proton Saga car and showed SP5 the drugs. SP5 then gave the pre-arranged signal to arrest and the police party arrested the four accused. The four accused were charged with trafficking in 14,964.5g of cannabis in furtherance of their common intention, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA') and read with s 34 of the Penal Code ('Code') ('the first charge'). The second charge against the four accused concerned possession of heroin weighing 7.94g, in furtherance of their common intention, an offence under s 12(2) of the DDA read with s 34 of the Code. At the end of the prosecution's case, the learned trial judge acquitted and discharged the

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

appellant and the fourth accused while the second accused and the third accused were convicted and sentenced accordingly. However, upon the public prosecutor's appeal, another panel of the Court of Appeal ordered the appellant's defence to be called while the acquittal and discharge of the fourth accused was affirmed. The learned trial judge heard the appellant's defence and ultimately at the end of the defence case convicted the appellant on both the charges. Hence this appeal.

Held, dismissing the appeal:

(1) The maximum evaluation of the evidence would range from ascertaining any infirmities, gaps or contradictions that are so material as to affect the main ingredients of the offence with the result that no prima facie case has been made out and an acquittal should be ordered. The credibility of the prosecution witnesses and the accuracy of their assertions must be assessed carefully and judiciously. Any reasonable and favourable inferences that may be drawn in favour of the accused must be drawn. The duty of the learned trial judge to undertake a meticulous examination of the evidence is independent from the issues raised by the defence, although the trial judge is invariably bound in the course of such examination to consider the numerous issues raised. The purpose of undertaking such a maximum evaluation is to test the credibility of the prosecution's witnesses and at the same time to ensure that all the requisite ingredients of the offence have been made out. A thorough examination of the evidence must be undertaken as opposed to just a mere cursory review (see paras 50–51).

(2) The appellant failed to raise any reasonable doubt that the appellant was in fact actively involved and was the principal organiser in supplying the drugs in question. The defence of the appellant was a bare denial. The defence of bare denial is no defence. The bare denial cannot in law raise a reasonable doubt and the appellant must be convicted for both the charges (see paras 53–55).

(3) Both SP5 and SP6 were agents provocateur. What SP5 and SP6 did were clearly within the provisions of s 40A(1) of the DDA. The evidence of an agent provocateur can stand alone without any corroboration. Based on the evidence of both SP5 and SP6, there was no necessity for the prosecution to lead corroborative evidence against the appellant. The appellant could be convicted on the uncorroborated evidence of SP5 and SP6 (see paras 60–62).

(4) The evidence clearly showed that the appellant had common intention to commit the offences as stipulated in both the charges together with the second accused and the third accused. The offences were planned by the appellant together with the second accused and the third accused (see para 63).

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

(5) The prosecution was not relying on the presumptions in s 37(d) or s 37(da) of the DDA. Rather the prosecution relied on the evidence of 'supplying' the dangerous drugs which is considered as one of the acts of 'trafficking' as defined in s 2 of the DDA. The prosecution had proved beyond reasonable doubt both the charges against the appellant (see para 65–66).

[Bahasa Malaysia summary

Sarjan Detektif Busra ('AP5') dan Cif Inspektor Ahmad ('SP6') telah diarahkan untuk bertindak sebagai ejen perangkap. Mereka diperkenalkan oleh satu sumber kepada perayu. Perayu sanggup membekalkan ganja sebanyak 30kg. Beberapa minggu kemudian SP5 telah menerima panggilan telefon daripada perayu memberitahu SP5 bahawa dia telah mendapat ganja sebanyak 40kg. Perayu kemudian mempekenalkan SP5 dan SP6 kepada tertuduh kedua dan mereka berbincang tentang bekalan dadah. Pada hari tangkapan, SP5 dan SP6 berjumpa dengan empat orang tertuduh di gerai di mana mereka membincangkan harga dadah tersebut. Tertuduh ketiga kemudian membawa SP5 ke kereta Proton Saga dan menunjukkan SP5 dadah tersebut. SP5 kemudian memberikan isyarat yang telah dirancang untuk membuat tangkapan dan pasukan polis telah menangkap kempat-empat tertuduh. Empat orang tertuduh telah dituduh mengedar 14.964.5g kanabis bagi mencapai niat bersama, satu kesalahan yang dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB') dan dibaca dengan s 34 Kanun Keseksaan ('Kanun') ('pertuduhan pertama'). Pertuduhan kedua terhadap empat tertuduh itu adalah berkaitan milikan heroin seberat 7.94g bagi mencapai niat bersama mereka, satu kesalahan di bawah s 12(2) ADB dibaca bersama s 34 Kanun. Di akhir kes pendakwaan, hakim perbicaraan yang bijaksana telah melepas dan membebaskan perayu dan tertuduh keempat manakala tertuduh kedua dan tertuduh ketiga telah disabitkan dan dihukum sewajarnya. Walau bagaimanapun, atas rayuan pendakwa raya, panel Mahkamah Rayuan yang lain telah memerintahkan pembelaan perayu dipanggil manakala pelepasan dan pembebasan tertuduh keempat disahkan. Hakim perbicaraan yang bijaksana telah mendengar pembelaan perayu dan di akhir kes pembelaan telah mensabitkan perayu terhadap kedua-dua pertuduhan. Justeru itu rayuan ini.

Diputuskan, menolak rayuan:

(1) Penilaian maksimum keterangan berkisarkan penentuan apa-apa kelemahan, lompang atau percanggahan yang ketara sehingga boleh menjejaskan elemen penting kesalahan yang mengakibatkan tiada kes prima facie dibuat dan pelepasan wajar diperintahkan. Kebolehpercayaan saksi-saksi pendakwaan dan ketepatan penegasan mereka perlu dinilai dengan teliti dan betul. Sebarang inferens munasabah dan positif yang boleh dibuat menyebelahi tertuduh perlu dilakukan. Tugas hakim perbicaraan yang bijaksana wajib melaksanakan

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

pemeriksaan terperinci ke atas keterangan adalah berasingan daripada isu-isu yang ditimbulkan oleh pembelaan meskipun hakim perbicaraan seringkali terikat dengan proses pemeriksaan sebegini untuk menimbangkan pelbagai isu yang berbangkit. Tujuan pelaksanaan suatu penilaian maksimum adalah untuk menguji kebolehpercayaan saksi-saksi pendakwaan dan pada masa sama memastikan agar semua elemen yang diperlukan untuk kesalahan terbukti. Pemeriksaan teliti ke atas keterangan perlu dilaksanakan dan bukan hanya semakan sepintas lalu sahaja (lihat perenggan 50–51).

(2) Perayu telah gagal menimbulkan apa-apa keraguan munasabah bahawa perayu pada hakikatnya terlibat secara aktif dan merupakan pelaksana utama membekalkan dadah yang dipersoalkan. Pembelaan perayu hanya penafian biasa. Pembelaan penafian biasa bukan suatu pembelaan. Penafian biasa tidak boleh dari segi undang-undang menimbulkan keraguan dan perayu hendaklah disabitkan untuk kedua-dua pertuduhan (lihat perenggan 53–55).

(3) Kedua-dua SP5 dan SP6 merupakan ejen perangkap. Apa yang dilakukan oleh SP5 dan SP6 jelas dalam peruntukan s 40A(1) ADB. Keterangan ejen perangkap boleh berdiri dengan sendiri tanpa apa-apa sokongan. Berdasarkan keterangan kedua-dua SP5 dan SP6, tiada keperluan untuk pendakwaan mengemukakan keterangan sokongan terhadap perayu. Perayu boleh disabitkan atas keterangan tanpa sokongan SP5 dan SP6 (lihat perenggan 60–62).

(4) Keterangan jelas menunjukkan bahawa perayu mempunyai niat bersama untuk melakukan kesalahan yang ditetapkan dalam kedua-dua pertuduhan bersama dengan tertuduh kedua dan tertuduh ketiga. Kesalahan-kesalahan telah dirancang oleh perayu bersama dengan tertuduh kedua dan tertuduh ketiga (lihat perenggan 63).

(5) Pendakwaan tidak bergantung kepada anggapan-anggapan dalam s 37(d) atau s 37(da) ADB. Sebaliknya pendakwaan bergantung kepada keterangan 'supplying' dadah berbahaya yang dianggap sebagai salah satu daripada perbuatan mengedar sepertimana ditafsirkan dalam s 2 ADB. Pendakwaan telah membuktikan kedua-dua pertuduhan tersebut melampaui keraguan munasabah terhadap perayu (lihat perenggan 65–66).]

Notes:

For a case on s 12(2), 39B of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 683.

For cases on admissibility of evidence agent provocateur, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 351–352.

For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3109–3135.

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

Cases referred to

Andy bin Bagindah v PP [2000] 3 MLJ 644, (CA) (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, (FC) (refd)
Brannan v Peek [1947] 2 All ER 572, HL (refd)
DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Henry Heuser [1910] 6 Cr App Rep 76 (refd)
Looi Kow Chai & Anor v PP [2003] 2 AMR 89, CA (refd)
Mohamad Fauzi bin Ridzwan & Anor v PP [2006] 2 MLJ 15, CA (refd)
(1)Namasiyiam, (2) Rajindran, (3) Goh Chin Peng and (4) Ng Ah Kiat v Public Prosecutor [1987] 2 MLJ 336, SC (refd)
Nasaruddin Daud & Anor v PP [2010] 6 MLJ 35; [2010] 8 CLJ 21, CA (refd)
Pendakwa Raya lwn Losali & Satu Lagi dan satu rayuan lain [2009] 6 MLJ 54; [2010] 8 CLJ 560, CA (refd)
Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 AMR 2017 (refd)
PP v Low Soo Song [2004] 3 AMR 320 (refd)
PP v Mansor bin Md Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)
PP v Mohamed Halipah [1982] 1 MLJ 155 (refd)
PPv Mohd Farid Mohd Sukis & Anor [2002] 3 MLJ 401; [2002] 8 CLJ 814; [2002] 3 AMR 3457, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
PP v Neoh Wan Kee [1985] 1 MLJ 368 (refd)
PP v Nur Hassan bin Salip Hashim & Anor [1993] 2 CLJ 551, HC (refd)
R v Bickley (1909) 2 Cr App Rep 53; (1909) 73 JP 239 (refd)
Reg v Mullins (1848) 3 Cox CC 526 (refd)
Regina v Delgado [1984] 1 WLR 89, CA (refd)
Regina v Maginnis [1987] 1 AC 303, HL (refd)
Teja Singh & Mohamed Nasir v Public Prosecutor [1950] MLJ 71 (refd)

Legislation referred to

Criminal Procedure Code ss 173(ha), s 180(4)
Dangerous Drugs Act 1952 ss 2, 12(2), (3), 37(d), 37(da), 39B(2), 40A(1)
Misuse of Drugs Act 1971 [UK] s 5(3)
Penal Code s 34

Appeal from: Criminal Trial No 45–4 of 2004 (High Court, Kota Bahru)

Ameenuddin Ibrahim (Ameen Harbhajan & Co) for the appellant.
Jamil Aripin (Delpa Nair a/p Theraharan with him, Deputy Public Prosecutors, Attorney General's Chambers) for the respondent.

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant and three others were charged with trafficking in 14,964.5g of cannabis in furtherance of their common intention, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA') and read with s 34 of the Penal Code. That formed the first charge. While the second charge against the appellant and three others concerned possession of heroin weighing 7.94g, in furtherance of their common intention, an offence under s 12(2) of the DDA and punishable under s 12(3) of the DDA and read with s 34 of the Penal Code. Both the offences were said to be committed on 4 June 2003 at about 11.15pm in front of a shop at kilometre 1, Jalan Tanah Merah—Pasir Mas in the district of Tanah Merah, in the State of Kelantan.

[2] At the end of the prosecution's case, the learned trial judge acquitted and discharged the appellant and the fourth accused while the second accused and the third accused were convicted and sentenced accordingly. The public prosecutor appealed against the acquittal and discharge of the appellant and the fourth accused at the end of the prosecution's case and another panel of this court (see *Pendakwa Raya lwn Losali & Satu Lagi dan satu rayuanlain* [2009] 6 MLJ 54; [2010] 8 CLJ 560, (CA)) ordered the appellant's defence to be called while the acquittal and discharge of the fourth accused was affirmed.

[3] The learned trial judge heard the appellant's defence and ultimately at the end of the defence case convicted the appellant on both the charges. In regard to the first charge, the appellant was sentenced to death by hanging and in regard to the second charge, the appellant was sentenced to three years imprisonment with effect from the date of his arrest.

[4] This appeal concerned only the appellant.

THE FACTS

[5] Detective sergeant Busra bin Abdul Kadir ('SP5') together with Chief Inspector Ahmad Yanee bin Nazir ('SP6') were, at the material time, attached to the Narcotics Division of the Perak Police Contingent Headquarters. On 11 April 2003 at about 5pm they reported for duty to the head of the Kelantan Narcotics Division.

[6] Both SP5 and SP6 were directed to act as agents provocateur. SP5 played the role of a 'taukeh' interested in purchasing *ganja* while SP6 acted as his lackey—servile follower of SP5.

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

[7] On 14 April 2003 at about 11am, SP5 and SP6 were introduced to a source by ASP Umar AN Saifuddin ('SP7'). And at about 1pm of the same day at a coffee house of the Hotel Square Point at Kota Bharu, both SP5 and SP6 were introduced by the source to a male Malay known as 'Tok Uban'. At the introductory meeting, SP5 introduced himself as 'Isa'. Before the learned trial judge, SP5 identified the appellant as 'Tok Uban'.

[8] At the introductory meeting, SP5 testified that the appellant was willing to supply about 30kg of *ganja* at the price of RM1,300 per kg. On the same day, at about 5pm, SP5 briefed SP7 about what had transpired at that introductory meeting with the appellant.

[9] On 3 June 2003 at about 11am, SP5 received a telephone call from the appellant. In that telephone conversation, the appellant told SP5 that he had the supply of *ganja* with him about 40kg at the price of RM1,500 per kg but SP5 told the appellant that he could not collect the *ganja* immediately because his motorcar was spoilt. And, on the same day, at about 11.30am, SP5 informed both SP6 and SP7 about what had transpired.

[10] On 4 June 2003, SP5 and SP6 proceeded to the Kelantan Narcotics Division and met SP7. Once again, SP5 briefed SP7 about the telephone conversation which he had with the accused on 3 June 2003.

[11] SP5 testified that he was directed to use a motorcar bearing registration No DAJ 3809 which at that time carried a false number plate JDY 6252. SP5 also testified that he was given cash in the sum of RM30,000 by SP7 to be shown to the appellant.

[12] On 4 June 2003 at about 5pm, both SP5 and SP6 proceeded to Rantau Panjang, Kelantan at the request of the appellant. At 6pm of the same day, both SP5 and SP6 met the appellant. It was at this meeting that the appellant introduced to SP5 and SP6 to two male Malays by the name of Rohing and Yusof. SP5 identified Rohing as the second accused.

[13] SP5 and SP6 together with the appellant and the second accused as well as the male Malay known as Yusof then proceeded to a stall near the Rantau Panjang taxi stand to discuss about the supply of drugs. The second accused told SP5 that he could only supply 15kg of *ganja* at the price of RM1,050 per kg. The second accused also offered to supply 15 bottles of heroin at the price of RM900 per bottle to SP5. All these offers were accepted by SP5 and the latter also told the appellant and the second accused to send the drugs to Kota Bharu where SP5 stayed.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

[14] On 4 June 2003 at about 8pm, SP5 and SP6 returned to the Kelantan Narcotics Division and they both briefed SP7 about what had transpired at Rantau Panjang, Kelantan.

[15] On 4 June 2003 at about 8.30pm, SP7 organised a meeting of his police personnel in regard to an operation to nab the drug traffickers. Specific instructions were given to SP5 and SP6 to scratch their heads as a signal for the arrest to be carried out.

[16] While attending the briefing by SP7, SP5 received a telephone call from the appellant stating that the supply of drugs cannot be sent to Kota Bharu as promised but instead asked SP5 to meet the appellant at an Esso petrol pump station at Tanah Merah, Kelantan ('Esso petrol pump station') at 11.30pm on 4 June 2003. SP5 quickly relayed the said message to SP7.

[17] On 4 June 2003 at about 9.30pm, SP5 and SP6 took the same motorcar bearing the same false number plate JDY 6252 and proceeded to the Esso petrol pump station accompanied by a party of police personnel headed by SP7 who travelled in separate vehicles.

[18] At 10.30pm on 4 June 2003, SP5 and SP6 arrived at the Esso petrol pump station. They waited for a few minutes and soon thereafter they saw the appellant and the second accused walking towards the Esso petrol pump station accompanied by a male Malay who was later introduced by the appellant and the second accused as Mat. SP5 identified the third accused as Mat.

[19] When SP5 enquired as to the supply of the drugs, the third accused told SP5 to wait at the Esso petrol pump station while the third accused went to collect the drugs.

[20] Not long thereafter, the third accused returned to the Esso petrol pump station in a Proton Saga motorcar bearing registration number ACF 4588. SP5 testified that there was a woman in the car, later known as Miss Chepatchanee. SP5 identified the fourth accused as that woman.

[21] The third accused then directed SP5 to follow the Proton Saga motorcar driven by the third accused. The appellant together with the second accused and the fourth accused then boarded the motorcar bearing the false number plate JDY 6252 that was driven by SP5 and SP5 trailed behind the Proton Saga motorcar driven by the third accused from the rear. SP6 was also a passenger in SP5's motorcar.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

[22] According to SP5, approximately 1 km away from the Esso petrol pump station, the third accused stopped the Proton Saga motorcar along the stretch of stalls by the side of Jalan Tanah Merah/Pasir Mas. SP5 followed suit and he also stopped the motorcar driven by him there.

[23] All of them got down from the motorcars and proceeded to a table at the stall nearest to them. It was here that the second accused requested to take a look at the moneys that were supposed to be used to pay for the purchase of the drugs. SP5 then brought the second accused to the same motorcar bearing the same false number plate JDY 6252 and showed to the second accused the moneys that were given by SP7 in that motorcar. Satisfied with what he saw, the second accused then returned to the table. SP5 followed suit. At that table, the second accused told SP5 that he only had ten bottles of heroin and not 15 bottles as promised. The second accused also told SP5 that the price for 15kg of *ganja* and ten bottles of heroin was RM24,750 and the second accused asked the fourth accused to calculate the amount using a handphone and thereafter the fourth accused calculated and confirmed the price.

[24] The appellant then asked the second accused as to the price per kilo of *ganja* which the second accused quoted to SP5. The second accused replied that it was RM1,050. On hearing this, the appellant said that the price was incorrect and that the correct price was RM1,500. The second accused then re-calculated the price and said that the actual price was RM31,500. SP5 then requested to see the *ganja* and the heroin.

[25] The second accused then directed the third accused to show SP5 the supply of the drugs. The third accused then brought SP5 to the Proton Saga motorcar bearing registration number ACF 4588. In the said motorcar, the third accused showed to SP5 one white plastic gunny sack that was placed on the rear seat of the said motorcar. SP5 then opened the white plastic gunny sack and saw clums of herbal looking substances wrapped in transparent plastic sheet. SP5 then asked the third accused as to the whereabouts of the ten bottles of heroin. On hearing this, the third accused took one package from the area of the driver's sun visor at the driver's side and handed it to SP5. SP5 saw the package wrapped in a Thai newspaper. On opening the newspaper package, SP5 found ten plastic bottles containing white powdery substances. SP5 then wrapped back the ten plastic bottles in the Thai newspaper and put them inside the white plastic gunny sack containing clums of herbal looking substances. SP5 then directed the third accused to lock the said motorcar and together they returned to the same table.

[26] It was at this point of time that SP5 gave the pre-arranged signal to arrest to the rest of the police party. At the same time, SP5 saw SP6 together with the

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

appellant, the second accused and the fourth accused got up and were seen walking towards SP5. SP6 also gave the pre-arranged signal to arrest.

[27] On seeing the pre-arranged signal, SP7 and the rest of the police party sprang into action. They arrested the appellant as well as the second accused, the third accused and the fourth accused. The incriminating exhibits were also seized. Subsequently, the movements of the incriminating exhibits were fully accounted for and they were not disputed.

[28] In due course, the government chemist by the name of Abdullah Zayawi bin Muda ('SP4') examined and analysed the incriminating exhibits and confirmed them to be dangerous drugs under the DDA, to wit, 14,964.5g of cannabis and 7.94g of heroin.

[29] The registered owner of the Proton Saga motorcar bearing registration number ACF 4585 gave evidence for the prosecution. He was Mohamad Ramli bin Mat ('SP8') and he testified that he had sold the said motorcar to the third accused in 2001. To verify the sale of the said motorcar to the third accused, SP8 produced an agreement of sale marked as exh P22. According to SP8, he did not use the said motorcar after he had handed same to the third accused.

ANALYSIS

[30] On these facts, the learned trial judge found at the end of the prosecution's case that there was no prima facie case made out against the appellant and forthwith acquitted and discharged the appellant. The public prosecutor launched an appeal to this court against that acquittal and discharge.

[31] Another panel of this court allowed the appeal of the public prosecutor and held that the prosecution had succeeded in establishing a prima facie case against the appellant on both the charges. The learned trial judge was ordered to hear the defence of the appellant on both the charges.

[32] According to s 180(4) of the Criminal Procedure Code 'a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction'.

[33] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, (FC); [2005] 1 CLJ 85, (FC), the test to determine whether a prima facie case has been made out was formulated by Augustine Paul, JCA in these erudite terms (see p 100):

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[34] Another pertinent case to cite would be the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203. There Gopal Sri Ram, JCA speaking for the Federal Court in simple language summarised the steps to be undertaken by the trial court at the close of the prosecution's case along these lines (see p 400 (MLJ) p 211(CLJ)):

> (i) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
>
> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'NO' then, a prima facie case has not been made out and the accused should be acquitted;
>
> (iii) after the defence is called, the accused elects to remain silent, then convict;
>
> (iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.

[35] The learned trial judge read and explained the three options to the appellant and he elected to give evidence in the witness box in accordance with s 173(ha) of the Criminal Procedure Code.

[36] In his defence, this was what the appellant testified. That on 14 April 2003 at about 10am, Zakaria picked him up at the Thailand/Malaysia border to meet Busra (SP5) at a hotel in Kota Bharu. In that meeting, SP5 had asked him to look for drugs. He told SP5 that he did not dabble with that thing but Zakaria told SP5 that Zakaria was willing to look for drugs. A friend of SP5 was with them. He denied telling SP5 that he was willing to supply 30kg of *ganja* at the price of RM1,300 per kg. After that meeting, Zakaria sent him back.

[37] The appellant also denied telephoning SP5 on 3 June 2003 requesting SP5 to come to Kelantan. On the contrary, the appellant said that it was Zakaria who had telephoned him as well as SP5 to come to Rantau Panjang. The appellant then said that on 4 June 2003 he had gone to Rantau Panjang to meet Rohing (the second accused) and Yusof but Zakaria was not there. After

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

that he saw SP5 arrived with the same person. He then introduced SP5 to the second accused and Yusof. He saw them talking to one another but he did not hear what they were talking about. He knew the second accused but he did not know Yusof.

[38] The appellant testified further that he returned home using a motorcycle and that was at about 7pm. The second accused requested the appellant to wait at the head of the bridge at Rantau Panjang at the border of Rantau Panjang/Golok because the second accused requested him to accompany the second accused to the house of Mohd Awang ('the third accused') at Tanah Merah. The appellant together with the second accused and Miss Chepatchanee ('the fourth accused') went to Tanah Merah in a motorcar driven by the second accused. Upon arrival at Tanah Merah, the second accused alighted from the motorcar and made a telephone call. Not long thereafter, the third accused arrived. From there, all the four of them proceeded to the Esso petrol pump station in the third accused's motorcar.

[39] Upon arrival at the Esso petrol pump station, he saw the third accused talking to SP5 and standing by the side of SP5's motorcar before the third accused left the place. He together with the second accused and the fourth accused then boarded SP5's motorcar to go to a food stall to purchase some refreshments. About 15 minutes later, the second accused arrived at the food stall and the second accused called out to SP5 to stand nearer to the second accused's motorcar. While he together with the fourth accused and SP5's friend waited at the food stall. He waited for quite some time and he then got out of the food stall and proceeded towards the third accused's motorcar. But before he reached the third accused's motorcar, he saw the police arrested both the second accused and the third accused. He and the fourth accused were also arrested.

[40] The appellant also denied being involved in calculating the price of the drugs.

[41] Under cross-examination, the appellant denied the proposition by learned deputy prosecutor that he had informed SP5 about his willingness to supply 30kg of drugs at the price of RM1,300 per kg at the first meeting with SP5. The appellant also denied contacting SP5 on 3 June 2003 and stating that the drugs which he promised to supply in the amount of 40kg of *ganja* were in his safekeeping with a price tag of RM1,300 per kg. The appellant further denied participating in the discussion to supply drugs together with the second accused and SP5 in Rantau Panjang. The appellant also denied arranging the meeting at the Esso petrol pump station on the night of the arrest and the appellant further denied boarding SPS's motorcar on the night in question in order to settle the sale and purchase transaction of the drugs.

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

[42] There was no re-examination of the appellant by learned counsel. A

[43] Now, the pertinent question of whether the appellant played an active role in the discussions pertaining to the sale of the drugs had been considered by another panel of this court. Put in a different way, this issue had been decided. B

[44] Another panel of this court when ordering the defence of the appellant to be called had satisfied itself that not only the appellant was actively involved in the discussions pertaining to the sale of the drugs to SP5, the appellant was also the principal organiser and had acted in concert with the second accused and the third accused with a common intention to sell the drugs to SP5 and SP6. C

[45] Hence, there is no necessity for this panel to consider the issue once again because it is a spent issue. It was factually held by another panel of this court that the appellant played an active role and was instrumental in selling the drugs to SP5 and SP6. D

[46] Indeed the learned trial judge, after hearing the defence of the appellant, held that the defence failed to raise any doubt on the prosecution's case particularly in relation to the active role played by the appellant and the appellant's common intention with the second accused and the third accused to sell the drugs to SP5 and SP6. At p 40 of the appeal record, the learned trial judge had this to say: E F

> … saya mendapati tiada fakta-fakta baru yang telah ditimbulkan oleh pihak pembelaan untuk menimbulkan apa-apa keraguan yang munasabah ke atas dapatan Mahkamah Rayuan yang dinyatakan di atas.

G

[47] Another panel of this court even agreed with the submissions of learned deputy public prosecutor that both the charges against the appellant invoked s 34 of the Penal Code and that there were prior planning between the appellant and the rest of the accused persons to supply the drugs to SP5 and SP6. Another panel of this court had this to say (see para 26 of the CLJ reporting at p 571): H

> Kami bersetuju dengan hujahan timbalan pendakwa raya. Jelas di dalam kes ini hakim bicara adalah silap apabila membebaskan tertuduh pertama (perayu) tanpa dipanggil membela diri. Kami dapati dari keterangan yang dikemukakan, tertuduh pertama (perayu) adalah perancang utama dalam pengurusan jual beli dadah dengan SP5 dan SP6. Jelas, tertuduh pertama (perayu) yang memulakan rundingan dengan SP5 dan SP6. Kemudiannya, tertuduh pertama (perayu) yang memperkenalkan tertuduh kedua kepada SP5 dan SP6. I

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

[48] Continuing at para 27 of pp 571–572 of the CLJ reporting, another panel of this court aptly said:

> Dalam perundingan seterusnya, tertuduh pertama (perayu) yang menelefon SP5 pada hari kejadian untuk mengatakan bahawa mereka tidak dapat menghantar barang ke Kota Bharu di mana SP5 dan SP6 menginap, sebaliknya meminta SP5 dan SP6 datang ke pam minyak Esso di Tanah Merah. Di sana tertuduh pertama (perayu) dan kedua telah memperkenalkan tertuduh ketiga kepada SP5 dan SP6. Kemudiannya, tertuduh pertama (perayu) telah bersama-sama menaiki kereta SP5 mengekori kereta tertuduh ketiga yang membawa dadah-dadah seperti yang dijanjikan kepada SP5.

[49] It is obvious from the recital of the facts that the appellant was not a mere 'introducer' as claimed by the appellant. Rather the appellant played a major role in his discussions with SP5 pertaining to the supply of the drugs. The following factual matrix must be highlighted:

(a) On 14 April 2003 at about 1pm, the source had introduced SP5 and SP6 to the appellant.

(b) SP5 discussed about the supply of *ganja*. The appellant was willing to supply 30kg of *ganja* to SP5 at the price of RM1,300 per kg.

(c) On 3 June 2003 at about 11am, the appellant telephoned SP5 and told SP5 that the appellant had the supply of drugs totally 40kg at the price of RM1,500 per kg.

(d) The appellant requested SP5 to come to Kelantan on that day. The appellant gave his house telephone number and requested SP5 to contact him once SP5 had reached Kota Bharu.

(e) SP5 telephoned the appellant and told the appellant that SP5 could not go to Kota Bharu on 3 June 2003 because SP5's motorcar was spoilt.

(f) On 4 June 2003, both SP5 and SP6 met the appellant at the Rantau Panjang taxi stand at about 6pm.

(g) There, the appellant introduced the second accused and a person named Yusof to both SP5 and SP6. Thereafter, the parties, namely, SP5, SP6, the appellant, the third accused and Yusof discussed about the supply of the drugs. The third accused volunteered the information that he could only supply 15kg of *ganja* at the price of RM1,500 per kg. The third accused also offered 15 bottles of heroin at the price of RM900 per bottle to SP5.

(h) SP5 agreed with those offers and requested the appellant and the third accused to send the supply of drugs to SP5 at Kota Bharu. They agreed.

(i) On 4 June 2003, SP5 received a telephone call from the appellant wherein the appellant stated that he could not send the drugs to Kota

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

Bharu and instead asked SP5 to go to Tanah Merah, Kelantan and meet at the Esso petrol pump station at 11.30 pm.

(j) On 4 June 2003 at about 10.30pm, SP5 and SP6 met the appellant at the Esso petrol pump station. There both the appellant and the second accused introduced the third accused to SP5 and SP6.

(k) SP5 enquired of the third accused about the supply of drugs as promised and the third accused asked SP5 to wait at the Esso petrol pump station while the third accused fetched the drugs. Not long thereafter, the third accused arrived in a motorcar at the Esso petrol pump station with the fourth accused. Both the third accused and the fourth accused got down from the motorcar and met SP5.

(l) The third accused directed SP5 to follow the motorcar driven by the third accused. SP5 complied and SP5 drove his motorcar with the appellant, the second accused, the fourth accused and SP6 as passengers.

(m) The third accused stopped his motorcar along the stretch of the food stalls. SP5 followed suit. All the passengers in SP5's motorcar including SP5 himself got down from SP5's motorcar. They all proceeded to one of the tables at the food stalls. There the second accused expressed his desire to see the moneys and SP5 brought him to SP5's motorcar to show the moneys to the second accused and both of them then returned to the same table.

(n) The third accused declared that there were ten bottles of heroin and 15kg of *ganja* and the price was RM24,750.

(o) The appellant asked the second accused as to the price quoted by the second accused. The second accused replied that it was RM1,050. The appellant retorted that the price was incorrect and that the price as agreed was RM1,500 and the second accused then did a recalculation.

[50] The maximum evaluation of the evidence led by the prosecution was critically tested, scrutinised with a tooth comb and evaluated at great length by another panel of this court. However, it is not easy to define the meaning or the scope to the magical words 'maximum evaluation' which were referred to in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 AMR 2017, and in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 AMR 89, (CA), and in *Public Prosecutor v Mohd Radzi bin Abu Bakar*. It involves a whole gamut of factors to consider. The net will be thrown wider. It would range from ascertaining any infirmities, gaps or contradictions that are so material as to affect the main ingredients of the offence with the result that no prima facie case has been made out and an acquittal should be ordered. The credibility of the prosecution witnesses and the accuracy of their assertions must be assessed carefully and judiciously. Any reasonable and favourable

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

inferences that may be drawn in favour of the accused must be drawn. And the need to evaluate the evidence of the prosecution from all angles cannot be overlooked.

[51] It goes without saying that in order to ascertain whether a prima facie case has been made out against the appellant, the evidence led by the prosecution in the course of the prosecution's case must be evaluated at a maximum level. The duty of the learned trial judge to undertake a meticulous examination of the evidence is independent from the issues raised by the defence, although the learned trial judge is invariably bound in the course of such examination to consider the numerous issues raised. Indeed the purpose of undertaking such a maximum evaluation is to test the credibility of the prosecution's witnesses and at the same time to ensure that all the requisite ingredients of the offence have been made out. A thorough examination of the evidence must be undertaken as opposed to just a mere cursory review.

[52] We say that the impeccable judgment of another panel of this court in deciding that the defence of the appellant should be called for both the charges is beyond reproach.

[53] Having considered the defence of the appellant, the learned trial judge rightly came to the conclusion that the appellant failed to raise any reasonable doubt that the appellant was in fact actively involved and was the principal organiser in supplying the drugs in question.

[54] The learned trial judge rightly held that the defence of the appellant was a bare denial. It is trite law that the defence of bare denial is no defence. What this amounts to is this. That the appellant did not offer any explanation to the two charges and merely denied the evidence advanced by the prosecution. That was indeed a perilous course to undertake.

[55] The bare denial cannot in law raise a reasonable doubt and the appellant must be convicted for both the charges. Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195, had this to say in regard to the defence of simple denial:

> The defence was, in effect, a simple denial of the evidence connecting the appellant with the four boxes. We cannot see any plausible ground for saying that the four boxes were not his. In the circumstances of the prosecution evidence, the High Court came, in our view, to the correct conclusion that this denial did not cast a doubt on the prosecution case against the appellant.

[56] In *Public Prosecutor v Nur Hassan bin Salip Hashim & Anor* [1993] 2 CLJ 551, Ian HC Chin JC had this to say at p 556 of the report:

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

> The evidence of the second accused was only one of denial; denial of having ever seen the orange plastic bag containing the cannabis, denial of having been together with the first accused, denial of sitting on the same chair together with the first accused and denial of being found immediately next to the orange plastic bag containing the cannabis. All these evidence of the second accused were offered in contradiction to the evidence of the prosecution. The denials have not in any way created any doubt, on a balance of probabilities, in the case of the prosecution. Neither were the presumptions of possession or knowledge rebutted. Nothing was offered by the evidence of the second accused by way of rebutting the presumption of trafficking arising from the fact that the cannabis weighed 311.4g. The second accused had also therefore failed to rebut the presumption of trafficking.

[57] This court speaking through Shaik Daud JCA in *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644, (CA), made adverse comments about the efficacy of the defence of mere denial in these erudite terms (see p 647):

> In the present case, the appellant's defence was a mere denial and nothing more. In *Mohamad Radhi*'s case the qualifying factor was that, 'unless the evidence in a particular case does not obviously so warrant '. The defence was not a mere denial but that he was in possession of the bag in which the offending drug was found but that he was an innocent and a momentary carrier and called several witnesses in support of that defence. The trial judge simply brushed aside all these and held that since the accused had failed to rebut the presumption of possession under s 37(d) of the Act, the presumption under s 37(da) of the Act had also not been rebutted. As can be seen in the light of the defence therein, the trial judge failed to carry out a separate exercise to consider whether the defence had also rebutted the presumption of trafficking.
>
> In the present case, the appellant had denied possession and the learned judge found that after considering the whole evidence, including that of the appellant, he was satisfied that the prosecution had proved their case beyond a reasonable doubt and the appellant had failed to raise any doubt, we find no reason to disagree with the learned judge. Therefore, the circumstances in the present case did not warrant the learned judge to undertake a separate exercise.

[58] Kamalanathan Ratnam J in *Public Prosecutor v Low Soo Song* [2004] 3 AMR 320, at p 333 had to reckon with the defence of mere denial and he did not give much mileage to such a defence.

[59] Now, both SP5 and SP6 were agents provocateur. The facts clearly supported such a conclusion. What SP5 and SP6 did were clearly within the provisions of s 40A(1) of the DDA. That s 40A(1) stipulates that no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence if the attempt to abet or abetment was for the sole purpose of securing evidence against such person. Yusof Abdul Rashid J, after making reference to s 40A(1)

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

of the DDA in *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155, explained the rationale for its existence in the DDA in this way (see p 157):

> It is indeed difficult to secure evidence in the normal way where an offence under s 39B of the Ordinance is concerned and the act of the police in resorting to this method of using an agent provocateur, though undesirable, is necessary in circumstances where drug trafficking has become a national issue, which may lead to national crisis.

[60] And His Lordship Yusof Abdul Rashid J in *Public Prosecutor v Mohamed Halipah* concluded that the evidence of an agent provocateur can stand alone without any corroboration.

[61] Based on the evidence of both SP5 and SP6, there was no necessity for the prosecution to lead corroborative evidence against the appellant. The appellant can be convicted on the uncorroborated evidence of SP5 and SP6 (*Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368, at p 372; *(1)Namasiyiam, (2) Rajindran, (3) Goh Chin Peng and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336, (SC); *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] MLJ 71; *Brannan v Peek* [1947] 2 All ER 572; *Reg v Mullins* (1848) 3 Cox CC 526; *R v Bickley* (1909) 2 Cr App Rep 53; (1909) 73 JP 239; and *Henry Heuser* [1910] 6 Cr App Rep 76).

[62] The evidence as alluded to earlier clearly showed that the appellant had common intention to commit the offences as stipulated in both the charges together with the second accused and the third accused. These offences were planned by the appellant together with the second accused and the third accused notwithstanding the fact that the appellant was not inside the Proton Saga motorcar bearing registration No ACF 4588 where the dangerous drugs were found.

[63] The learned trial judge rightly concluded that the prosecution relied on the ingredient of 'supplying' within the definition of trafficking in s 2 of the DDA and not on the ingredient of 'procuring' that became the basis of the prosecution's case in the celebrated case of *Mohamad Fauzi bin Ridzwan & Anor v Public Prosecutor* [2006] 2 MLJ 15, (CA).

[64] In prosecuting the appellant for both the charges, the prosecution was not relying on the presumptions in s 37(d) of the DDA or s 37(da) of the DDA. Rather the prosecution relied on the evidence of 'supplying' the dangerous drugs which is considered as on of the DDA of the acts of 'trafficking' as defined in s 2 . Such an approach is laudable and receives the approval of this court in *Nasaruddin bin Daud & Anor v Public Prosecutor and another appeal*

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

[2010] 6 MLJ 35; [2010] 8 CLJ 21, (CA). which vigorously applied the Federal Court case of *Public Prosecutor v Mansor bin Md Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233, (FC).

[65] The word 'trafficking' is defined in the DDA. And according to Augustine Paul J (later FCJ) in *Public Prosecutor v Mohd Farid Mohd Sukis & Anor* [2002] 3 MLJ 401; [2002] 8 CLJ 814; [2002] 3 AMR 3457, the word 'trafficking' as defined in s 2 of the DDA must be given its ordinary meaning.

[66] Here, the word 'supplying' is not defined in the DDA. In Britannica World Language Edition of the *Oxford Dictionary*, Vol 2, at p 2086, the word 'supply' is defined as:

> The action of supplying, or condition of being supplied. The act of supplying something needed.

[67] We will now refer to the House of Lords decision in *Regina v Maginnis* [1987] 1 AC 303. In that case Maginnis was found guilty of an offence contrary to the Misuse of Drugs Act 1971, s 5(3). A package containing cannabis resin was found in his car. He claimed that the drug had been left by a friend who was to pick it up later. Lord Keith, in a speech with which the three Law Lords agreed, had no difficulty in concluding that a return of the drugs to the trafficker would be a supply, thus satisfying s 4(3), and that possession by the custodier would be with intent to supply, thus satisfying s 5(3). Lord Keith pointed out that the trafficker has no legal right to require the drugs to be given back to him.

[68] Another case to refer to would be the case of *Regina v Delgado* [1984] 1 WLR 89at p 92, a decision of the English Court of Appeal. In that case, Delgado appealed against conviction for an offence contrary to s 5(3) of the Misuse of Drugs Act 1971. The trial judge had directed that Delgado's intention to return the cannabis, having been given it for a couple of hours by two people who told him that they had stolen the cannabis and had no where to keep it, was an intention to supply. The Court of Appeal dismissed the appeal, saying that while 'supply' covers a wide range of transactions, 'A feature common to all of those transactions is a transfer of physical control of a drug from one person to another'.

CONCLUSION

[69] It is our finding that the appellant had failed to raise any reasonable doubt as to his guilt. We are satisfied that the prosecution had proved beyond reasonable doubt both the charges against the appellant. The learned trial judge had therefore not erred in finding the appellant guilty of both the charges,

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Tue Aug 30 07:26:30 2011
//caseml/case/mlj/2011_004_mlj_694

convicting him and sentencing him to death for the first charge and to three years imprisonment with effect from the the date of his arrest for the second charge. The convictions on both the charges against the appellant are safe.

Appeal dismissed.

Reported by Kanesh Sundrum